Rainbow House International

A Licensed Non-Profit Agency Serving Children

December 15, 2003

U.S. Department of State
CA/OCS/PRI
Adoption Regulations Docket Room, SA-29
2201 C Street, NW.
Washington, DC 20520

Re: **Docket State/AR-01/96: Comments on Proposed Regulations to Implement the Hague & IAA**

To Whom It May Concern:

Rainbow House International, a non-profit, international adoption and humanitarian aid organization, licensed for twenty years, hereby submits its comments to certain provisions of the Proposed Hague Regulations (the "Proposed Regulations").

Rainbow House International applauds the goals embodied in the Hague Convention on Protection of Children and the proposed regulations provide some excellent guidelines for governance of inter-country adoptions. Further, RHI also believes that inter-country adoption protects children while ensuring that adoption, rather than institutionalization or long term foster care, is the preferred alternative for orphaned children worldwide. To this extent however, RHI is also concerned that some of the regulations as stated, could have a negative impact on inter-country adoption, and we offer our comments on several specific issues for the Department's consideration.

To this effect, we respectfully request that the Department consider issuance of an "interim ruling with public comment" to allow for a more cooperative and collaborative effort with the adoption community before the finalization of regulations.

Rainbow House International believes it is important to streamline the regulatory process so as not to create additional unnecessary hardship and expense to the adoption service providers, which in turn, pass it on to the adoptive families, or serve to discourage qualified service providers from seeking accreditation or approval. Specifically, we respectfully request that certain provisions that cover risk and liability issues be carefully examined and, if necessary, amended to more accurately reflect the structure of inter-country adoption services and the negative impact that the regulations, as written, may ultimately place on the service providers, adoptive families and the very children that the Convention seeks to protect

The Proposed Regulations provide some wonderful guidelines for international adoption agencies to follow to ensure that important policies behind the Hague Adoption Convention are

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accomplished. However, we are extremely troubled by the impact of the risk and liability provisions that are proposed. Therefore, we have devoted the majority of our comments to those points. In addition, we address certain additional important issues to a lesser extent following our risk and liability analysis. We respectfully request that the U.S. Department of State consider our serious concerns in seeking certain changes to the proposed regulatory scheme.

The State Department Exceeds Its' Authority.

Rainbow House International respectfully submits that implementation of the proposed risk and liability framework in section 96.45(c)(1) and 96.46(c)(1) goes far beyond the scope of the Hague Convention Treaty and the Inter-country Adoption Act of 2000 (the "IAA") and that the State Department would be exceeding its authority to implement such a structure. Certain risk and liability provisions exceed far beyond permissible boundaries. Specifically, the proposed regulations require that service providers "assume tort, contract, and other civility liability to the prospective adoptive parents for the ... supervised provider's provisions of the contracted adoption services and its compliance with the standards in this subpart F." See 96.45(c)(1) & 96.46(c)(1). This language creates a strict liability scheme, as it requires that accredited service providers that are primary providers be held financially responsible for all risks within the inter-country adoption process without regard to their fault.

Under standard principles of common law, a plaintiff must demonstrate that a defendant was negligent in order to hold such defendant legally responsible for resulting damages. Such plaintiff must prove the defendant's negligence by a preponderance or greater weight of the credible evidence standard and that such negligence was a proximate cause of the incident that caused the alleged damage. The Proposed Regulations alter basic principles of tort law by removing the need for adoptive parents to demonstrate any fault whatsoever on the part of their accredited service provider in order to collect a judgment. All that adoptive parents must do to assert a claim for damages incurred to collect against their accredited agency. Indeed, the proposed scheme would bestow upon adoptive parents a greater legal guarantee than for parents who conceive a child biologically.

Creation of a strict liability scheme is a public policy decision vested solely in the legislative branch of government - Congress. Congress, alone has the authority and accountability to dictate public policy. Unlike the legislative process, rule making by administrative service providers does not involve the collaborative effort of elected officials but the views of officials appointed by other branches of government. Accordingly, administrative service providers do not have the authority to dictate public policy, but rather to expound upon public policy already established by Congress. Accord Chambers v. St. Mary's School, 697 N.E.2d 198 (Ohio 1998). RHI respectfully submits that the State Department's proposal and adoption of regulations that create a strict liability standard is an unconstitutional usurpation of legislative authority

The following statement in the Regulations goes right to the heart of our concerns:

"In deference to the historically important role the formation of networks and the use of small agencies and persons have played in providing services ...the Department has created regulations that allow such relationships among agencies to continue. The Department's goal is to mirror current practices and to provide regulatory flexibility so that the regulations do not negatively affect small agencies and persons and other providers."

Notwithstanding this important recognition, the drafters propose implementation of a financial framework that goes beyond the scope of the legislation and endangers the agencies' very existence. Specifically, the financial framework does the following:

(a) Puts all liability of adoption service providers throughout the system to a single "primary provider;"

(b) Statutorily assigns all risk between adoptive parents and their agencies/service providers to the agency/service providers;
(c) Prevents the agencies' from sharing any risk within the system with adoptive parents by prohibiting informed waiver provisions;
(d) Requires maintenance of $1,000,000 per occurrence of insurance coverage; and
(e) Incongruously, imposes non-profit status on most agencies.

With the exception of the requirement for non-profit status, imposition of any of these requirements alone would be an enormous hardship for most agencies. The drafters have created a plan that is impossible for agencies to implement.

Assignment of Risk between Adoptive Parents to Service Providers

Certain liability sections of the Proposed Regulations, place an improper and extraordinary financial burden on the agencies that serve as primary providers. Specifically, the provisions expressly require that agency primary providers retain legal authority and "(1) assume tort, contract, and other civil liability to the prospective adoptive parent(s) for the supervised provider's provision of the contracted services and its compliance with the standards in this subpart F..." Proposed Reg. 96.45(b)(8) & (c) and 96.46(b)(9) & (c). These provisions have two important implications:

(A) The provisions will channel all liability, in tort, contract or otherwise within each case to a single "primary provider" for the actions of all adoption service providers in the U.S. and abroad in the process (subject to certain limited exceptions); and

(B) The provisions will assign all risk that is inherent in the international adoption system to the agencies versus the adoptive parent(s), thereby creating a statutory cause of action for the adoptive parents to pursue against their agencies.

Rainbow House International respectfully submits that creation of the proposed framework exceeds the authority of the Department of State as it reaches far beyond the legislation it purports to implement, and that such a framework presents enormous dangers for the future of international adoption. No other business, profit or non profit, has had such an application imposed. This sets an unfair business protocol.

Rainbow House International further submits that the State Department's proposal and adoption of regulations that create a strict liability standard is an unconstitutional usurpation of legislative authority.

The Risk and Liability Provisions Will Seriously Threaten The Future of International Adoption

The drafters' stated goals in proposing the risk and liability provisions of the proposed Regulations were: (a) to "improve supervision," by American agencies over its counterparts in the U.S. and abroad, Preamble, at p. 54081, and (b) to give parents "legal recourse against a single entity." Preamble, at 54081. The drafters' proposed solutions present enormous dangers for a number of reasons.

Firs the proposed liability framework will not cause primary provider agencies to improve supervision over their U.S.-based supervised homestudy agencies as primary provider agencies will avoid using supervised provider agencies who do only home study, parent preparation and post-placement services altogether. The risk of using an unaccredited supervised provider would be too great. Most accredited agencies would be unwilling to accept the legal responsibility and liability that using supervised providers would entail under the proposed regulatory scheme. If these small agencies and social workers (who collectively place thousands of children) are unable to procure written agreements with accredited agencies, they will surely go out of business. The drafters should recognize that these small providers are a vital link in the international adoption community, and without them, many children and adoptive parents will be lost to one another. And, ironically, these small local service providers are the only ones who can still get their own professional liability insurance coverage without difficulty since they are not involved with placing children and are almost never sued. See Section I(B)(3) below (Insurance Requirements). This will also create regional disparities in the country, as only wealthier and larger agencies will remain in business and only clients living in these regions will be able to adopt internationally.

Second, by imposing liability on the agency, the primary provider, there will not be improved supervision over foreign contacts. Agencies have limited if any, control over the events in foreign lands that can cause a problem with an adoption case to arise. There are language and cultural barriers, many foreign agency contacts do not have the resources to access health care, training, record keeping, or legal services that are in anyway comparable to those that we have in the United States. American agencies cannot be present for every abandonment in order to seek birth parent background and medical information or ask about their pre-natal care, nor can they visit every orphanage, supervise every doctors' visit, and file every paper for every child eligible for international adoption. If

resources were available to help children in foreign lands to this extent, there would not be such an enormous need for international adoption to help the children of these nations to find homes in the first place. American agencies' chances of successfully policing the events in foreign lands and their foreign counterparts is extraordinarily difficult to accomplish, and this purpose will not be accomplished effectively by imposition of an extraordinary level of liability on American primary provider agencies.

The improvement of supervision over foreign contacts is more appropriately accomplished elsewhere in the Hague Regulations. The drafters proposed a reasonable and appropriate means of encouraging supervision by expressly requiring agencies to investigate their foreign contacts, and to ensure that supervised providers here and abroad are ethical, meet certain standards, and understand and abide by the principles behind the Hague Convention. (Preamble, at 54084; Proposed Reg. Sec. 96.45(a) & 96.46(a).) The Hague Regulations take the further step of requiring that American agencies execute written agreements with their supervised providers in the U.S. and abroad that impose certain predefined requirements and certifications that are consistent with the Convention goals.

Third, the drafters have placed an enormous financial burden on the agencies that the agencies are in no position to assume. Most agencies do not have deep pockets, They are non-profit corporations with inherently limited resources. To ask a non profit to assume responsibility for the "local service providers" in the U.S. as well as for third party independent contractors in foreign lands is both unreasonable and unrealistic.

The majority of U.S. International agencies are in business to promote the charitable purpose of "uniting children living in terrible conditions in foreign orphanages with parents who want them." Howard M. Cooper, "Enforcement of Contractual Release and Hold Harmless Language in 'Wrongful Adoption' Cases," Boston Bar Journal, May/June 2000. For this reason, the state and federal government have granted such agencies non-profit status so that they can fulfill their important mission.

If anything, non-profit corporations deserve protection from liability in this already overly litigious society. In recognition of this policy, some states have enacted statutes that provide non-profits with immunity from liability for its own negligence. Fourth, the language of Sections 96.45(c) and 96.46(c), statutorily shifts all risk undertaken by prospective adoptive parents in pursuing foreign adoption to their agencies and creates a statutory cause of action for them. This strict liability standard will surely invite litigation from adoptive parents against the very agencies that are trying to help them build a family.

These regulations seem to promote litigation which will position agencies against other agencies and agencies against client adoptive parents. This blame-oriented framework does not serve the children, the families or do anything to sustain the mutual trust the agency community works so hard

to build. Agencies cannot control world events, orphanage conditions, available medical equipment, unknown genetic predispositions, or any of the other risks that lead to the disappointing result in the first place. Using liability as a threat to force agencies to improve these types of events will be excessive and ineffective. The drafters have already proposed a scheme that will ensure that agencies maintain equitable standards, ensure they work with third parties who maintain ethical standards, and be punished in the event they fail to comply with Hague standards. Those who advocate for Liability recourse further suggest that the liability provisions are an appropriate mechanism to compensate the parents for economic losses resulting from the acts of the foreign coordinators. Ever entity in the adoption field including BCIS currently advise adoptive parents of the inherent risks associated with inter-country adoption and ask that they be willing to assume this risk if this is the means by which they choose to build or enlarge family Why should the agencies be forced to accept fiscal responsibility for all participants throughout the entire system?

Contractual Waivers

The majority of U.S. Intern county adoption agencies advise their clients that international adoption is inherent of risk. Agencies advise the adoptive parents before the initiate a foreign adoption that they will be working in a foreign country, with a foreign government, foreign language, foreign culture, foreign medical systems and will be subject to the unknowns of foreign law and custom and that there are no guarantees. It is always possible that a foreign country will spontaneously decide to close their adoption programs. Moreover, agencies tell clients of the inherent risk of developmental delays in orphanage children and the possibility of unknown or undiagnosed medical and psychological conditions of the children due to factors beyond their control. Federal guidelines for the home study, as outlined by the BCIS require that this be in the home study. After acknowledging the possible hurdles and roadblocks, many prospective adoptive parents choose to proceed despite the known obstacles. And agencies reasonably ask parents to forego suing the agency if any of the risks becomes a reality, and many agencies ask that clients review their contracts with a legal advisor to assure that the client fully understands what is being asked..

The drafters have altered current practice substantially, and prohibited adoption agencies from protecting themselves in this most reasonable manner. Agencies must be able to share the risk and to protect themselves contractually from the threat of litigation by adoptive parent(s) as means of reasonable business practice. Why not require that clients review their contracts with a legal advisor prior to signing a contract to assure that the client has been fully informed? Educating clients is another way to have better informed clients. No obstetrician guarantees their patient the outcome of a delivery. If they were asked to assume all risks with a delivery there would be no obstetricians left.

Howard M. Cooper, "Enforcement of Contractual Release and Hold Harmless Language in Wrongful Adoption Cases," Boston Bar Journal May/June 2000, stated:

"In a litigious society such as ours, the ability of an agency to educate prospective parents about the risks of international adoption and then to ask them to accept those risk is indispensable to an agency's ability to carry out its charitable purpose...Put simply, the risks are multiple and known; and absent an ability to require prospective adoptive parents to a voluntarily accept the known risks, agencies may be precluded from their critical mission of finding homes for children."

Insurance Requirements

The Regulations further mandate coverage at a prohibitively high amount of insurance coverage - $1 million per occurrence. This is unreasonable for several reasons. First, it is already impossible for many agencies to procure professional liability coverage. The level of $1 million may be impossible to satisfy depending on cost and whether insurers will once again begin to underwrite this type of policy.

Second, if the Proposed Regulations specify a minimum of $1 million, this will encourage litigious clients and their attorneys to sue for this specific high amount. The combination of this high floor of insurance coverage and the proposed risk and liability provisions described in sections (a) and (b) above serve to encourage litigation. This will tie the hands of agency as they expend energy, time and effort to unlimited and groundless lawsuits. You should review the current standards in the insurance industry for adoption providers. The current limits as they are now, are often difficult if not impossible for most agencies to obtain. Our insurance broker has advised us specifically that he is not aware of any carrier that would insure for the acts of foreign independent contractors.

Risk and Liability Provisions

Agencies can not change the fact that children are abandoned due to extreme poverty, or that a country does not have the resources to provide adequate care for its young, or that a biological mother has experienced substandard pre or post natal care/nutrition, or possible undiagnosed genetic conditions. The term "abandonment" alone dictates that often very little information may be known about a child's medical history or genetic disposition. Orphanages staff spend their time and resources in meeting the basic life-sustaining needs of the children and are not usually equipped or trained to focus on extensive and accurate medical evaluations and diagnosis. In many instances, adequate testing to determine true levels of physical, development and/or emotional delays is not readily available in third world countries, too cost-prohibitive for underfunded orphanages, or is viewed as an unnecessary expense to waste on the country's unwanted children. This is the reality of our work.

We would further respectfully ask that the Department of State consider the precarious position of agencies in relation to the adoptive parents. As one author stated:

"Passions run high in these [wrongful adoption] cases. Often, they... involve parents whose emotions were already rubbed raw by not being able to have their own children. Many then faced a legal obstacle course to adopt. Gradually realizing that their long-awaited child has physical or mental problems can be the last straw, emotionally. What's more, to prove their case [against their agency], parents must often argue that they would not have adopted the children if they had known the truth." Wall Street Journal, December 7, 1998, "Are Adoption Agencies Liable for Not Telling All?" cited in Howard M. Cooper, "Enforcement of Contractual Release and Hold Harmless Langue in 'Wrongful Adoption' Cases," Boston Bar Journal, May/June 2000. Arming emotionally-charged parents with a target for their blame and despair will only fuel the litigation crisis further and lead to a counter-productive result.

The international adoption agency community would like the Department of State to recognize that the vast majority of agencies are in this industry for compassionate humanitarian reasons. Given that over 160,000 have been brought to the U.S. for adoption from foreign countries since 1989, the tragedies are remarkably few. In fact, if the State Dept were to review statistics of live births in the U.S. and compare the outcome of healthy children verses those with a defect or problem I'm sure the findings would reflect that the ratios are not vastly different from children placed through inter-country adoption.

We believe that the proposed liability structure of the Hague Regulations will go beyond the goals of the Hague Convention. It will destroy the ability of Americans who seek to grow their families through adoption to do so because they will not be able to afford the cost of the few agencies that will remain in business. And, of course, imposition of these impossible standards will have a tragic effect on the very children who the agencies, and the drafters of the Hague legislation, seek to help. It will also allow the few remaining agencies to impose further restrictive factors on their clients such as religious restrictions, thus limiting the pool of family resources. Many families will not be able to adopt because they will not be able to be regionally served.

The Hague Regulations can accomplish the purpose of the Hague Convention, and even some of the new purposes that apparently were added when drafting the Hague Regulations, by striking the following provisions:

(i) Strike sections 96.45(b)(8) & (c) and 96.46(b)(9) & (c)

(ii) Strike section 96.39(d), which ties the agencies hands from sharing any risk within the process with adoptive parents by prohibiting informed waiver

(iii) Strike section 96.33(h) - Requiring $1,000,000 per occurrence of insurance coverage. Insurance at this level should not be a requirement unless the Department of State can offer such a policy at an affordable rate.

We further ask the Department to request that the insurance industry analyze underwriting international adoption insurance policies for parents to individually defray the known risks of international adoption. Insurers cover domestic adoption risks, as well as travel insurance risks. It is not a far stretch for insurance companies to cover the risks associated with foreign adoption and not unreasonable to ask that the parents pay insurance premiums if they want the added protection from financial loss in the event of a disappointing result. Indeed, the prevailing likelihood of successful adoptions may actually create a solid revenue opportunity for insurers and lessen the risk on the agencies. Ultimately, because of the spread of risk among parties in the process, the insurers may once again be willing and able to provide agencies with professional and directors and officers policies to agencies.

Rainbow House International hereby requests that the Department of State extend the December 15, 2003 deadline for providing comments to the Proposed Regulations. While our agency and many involved with JCICS have been following closely the evolution of the Hague legislation and regulations, there are hundreds of agencies around the country that have only recently learned of the imminent legislative changes. Those agencies should be afforded more time to review the Proposed Regulations and determine how they will impact their agencies and their industry. Consideration of the input of more agencies will ensure the Proposed Regulations will be finalized with input from as many industry professionals as possible and that all relevant factors have been considered and evaluated.

Moreover, Rainbow House International requests that the next round of changes to the Proposed Regulations from the State Department be issued as an Interim Ruling, together with publication and an appropriate comment period. The current draft differs substantially from the Acton Burnell draft that has been circulating for the last several months, and raises entirely new issues that warrant a more thorough analysis and exchange of ideas.

Costs

Rainbow House International would like the Department of State to consider the economic impact of the Proposed Regulations. Without factoring in the risk and liability issues and insurance requirements raised in Part I above, Rainbow House International is concerned that the balance of the framework, while reasonable, will likely raise administrative costs substantially, which will, in turn be passed onto adoptive families. Some industry experts have estimated cost increases could be in the range of $4,500 per case ($3000 per case for accreditation purposes and another $1,500 per case for additional work to maintain Hague standards on an ongoing basis). John Towriss, "The Hague: Noble Treaty or Flawed Concept," Adoption Today September 2003) (quoting Carl Jenkins, an attorney specializing in adoption law).

These costs will increase even further if and when agencies procure professional liability policies and if such policies would cover the acts of third party supervised providers, as suggested by the risk

and liability provisions described above. See, Section I (A), above. One agency has done a comprehensive analysis on the subject and summarized its findings as follows:

> "While the specifics of these policies and the scope of coverage offered vary, our experience highlights that despite our excellent record, reputation and "loss histories" and well drafted waiver provisions in our documents, a lawsuit, regardless of merit, can jeopardize an agency's ability to obtain coverage. If the proposed Hague regulations go into effect with the liability and risk allocation provisions in place, we question whether any insurance carrier will continue to write policies for our community and, if so, at what cost. The following reflects how this regulation will financially impact agencies of all sizes and adoptive families."

Current Yearly Cost of Obtaining New Insurance for One Million Dollars Coverage - Not including coverage for Homestudy agency or Foreign Partner. Annual Premium;	**Divided by Number of Adoptive Families Per Year**	**Cost per Family**
$210,000	30	$7000
$210,000	100	$2100
$210,000	300	$700
$210,000	600	$350
$210,000	900	$233

Lillian Thogersen, World Association for Children and Parents, Email Memorandum Dated October 30, 2003 (copied with permission). The cost increase to be allocated to adoptive parents will clearly be substantial. Rainbow House International believes that international adoption will become a privilege available only to the rich and elite while potentially wonderful parents of lesser means are foreclosed from the prospect of international adoption entirely due to cost.

Masters Degree

Section 96.37(f) of the Proposed Regulations requires that home study personnel have a minimum of a master's degree. Rainbow House believes that this provision will greatly restrict the qualified applicant pool for such positions since many geographic areas, particularly in rural parts of the country, such as New Mexico, where master's level candidates are not readily available to hire. Adoption is not a practice area that is taught in many programs, and most professionals learn primarily on the job through experience in the industry. While a master's degree may provide some helpful tools for social workers performing home studies, it does not provide a guaranty of appropriate knowledge on intercountry adoption or adoption issues. A person with excellent family assessment skills can more than adequately study and provide services to an adoptive family.

Moreover, master's level social workers will be more expensive for service providers to hire and retain; and such costs will again be passed on to adoptive families. Finally, this provision can not be reconciled with 96.37(e) of the Proposed Regulations, which states a homestudy supervisor can have a bachelor's degree, as long as they also have appropriate other experience. Retention of these two provisions would have the incongruous result of requiring social work personnel to have a master's degree while their supervisors have a bachelors degree. For all of these reasons, RHI believes that section 36.37(f) should be modified and alternating the requirements of 96.37(e) to allow social workers who perform home studies to have a bachelor's degree, provided they have prior experience in family and children's services, adoption or inter-country adoption and requiring the home study or social work supervisor to have a minimum of a Master's Degree.

Rainbow House International further submits that Subpart K of the Proposed Regulations does not comply with the corresponding provisions in the IAA and does not afford agencies due process with respect to adverse actions issued by accrediting agencies.

The standards provide each accrediting entity no guidance whatsoever regarding which adverse actions to impose (suspension, cancellation of accreditation, non-renewal, or ceasing provision of services) under which circumstances. While the Proposed Regulations permit an accredited agency to respond to notice, Section 96.76(b), the agency will be forced to close its doors before it ever gets a chance to refute the charged deficiency.

Rainbow House International requests that the Department of State modify the language of the Proposed Regulations to incorporate the standards and guidelines set forth in the IAA, and to further set forth which violations warrant imposition of which adverse actions. The process should be modified not only so it is fair to the agencies, but so it is consistently applied by various accrediting entities nationwide.

Finally, we respectfully request that the Department delineate standard and specific procedures that accrediting entities must follow ..

Post-Placement

As our final comment, we would ask that the Department of State, together with Congress, impose a statutory regulation that would mandate that adoptive parents provide post-placement reports, in compliance with the requirements of the foreign country. To effectively accomplish the mandate of the Hague Convention, agencies need a means to secure their clients' future compliance with country requirements long after they have adopted their children. Presently American agencies are left with virtually no means of forcing their clients' compliance with country post-placement requirements, and contractual provisions have proven to be ineffective and difficult to enforce. Agencies are penalized by the foreign countries for non-compliance without having recourse. Accordingly, Rainbow House

International respectfully requests that the Department of State, together with the legislature, take this issue into account when finalizing the regulatory framework that implements the Hague Convention.

Rainbow House International appreciates the State Department's consideration of the issues raised herein, and looks forward to participating in a productive dialogue regarding our concerns.

Respectfully submitted,

Rainbow House International

Donna Clauss
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